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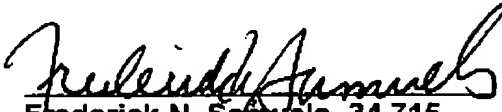
PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 166.0001	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on _____ Signature _____ Typed or printed name _____		Application Number 09/957,459	Filed 9/21/2001
		First Named Inventor Warren Roach et al.	
		Art Unit 2162	Examiner Baoquoc N. To
Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a notice of appeal. The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.			
I am the <input type="checkbox"/> applicant/inventor. <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96) <input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>34,715</u> <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34. _____		 Signature Frederick N. Samuels Typed or printed name 202-331-8777 Telephone number February 7, 2006 Date	
NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.			
<input type="checkbox"/> *Total of _____ forms are submitted.			

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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I hereby certify that this Amendment is being transmitted by facsimile to (703) 872-9306 and addressed to the Commissioner for Patents, Alexandria, VA on February 7, 2006



Frederick N. Samuels 34,715

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Roach *et al.*
Serial No. : 09/957,459 Examiner: To, Baoquoc N.
Filed : September 21, 2001 Group Art Unit: 2172
For : AN AUTOMATIC REAL-TIME FILE MANAGEMENT METHOD
AND APPARATUS

Pre-Appeal Brief Request for Review Attachment Sheets

Commissioner of Patents
Alexandria, VA 22313-1450

Sir:

Applicants request that the instant application be passed to allowance because:

- 1) The Office Action improperly equates the term "operating system" to the term "API",
- 2) the Office Action failed to give evidentiary weight to the Declaration of Steve Williams under 37 C.F.R. § 1.132. These fundamental errors permeate each of the rejections and require each rejection to be withdrawn.

On page 3, lines 4-11, the August 11, 2005 Office Action¹ states the following:

The API of Koshisaka perform [sic] exactly the same as the operating system as [sic] the applicant recited in claim 1. The functionality of both API in Koshisaka and the operating system from the current application having the same working purpose. Therefore under obviousness they are the same. Unless the definition of the

¹ Hereinafter, all references to the Office Action shall refer to the Office Action mailed August 11, 2005.

operating system which recited in the specification of current application is incorporated in the claim, otherwise, the "operating system" will be interpreted [sic] as API.

This is clear error. The term "operating system" is expressly defined in the specification, see paragraph [0028]. The Office Action does not and cannot challenge the fact that API's are not included within that definition. See page 10 of the amendment. It is black letter law that where an explicit definition is provided by the applicant for a term, that definition will control interpretation of the term as it is used in the claim. *Toro Co. v. White Consolidated Industries, Inc.*, 199 F.3d 1295, 1301; 53 USPQ2d 1065, 1069 (Fed. Cir. 1999). See the arguments presented at page 11, paragraphs 2-3 of the amendment filed May 24, 2005.² Accordingly, the term "operating system" as defined does not encompass APIs.


Each of the rejections in the Office Action are based on the faulty premise that the term "operating system" is synonymous with the term "API". Under the proper definition of "operating system" no *prima facie* rejection can be established using the art of record. Accordingly, the application should be passed to allowance.

Turning to the issue of the § 1.132 Declaration, as best understood by the undersigned, no evidentiary weight was given to the Declaration. See paragraph 2 of page 2 of the Office Action. There is no basis for failing to accord evidentiary weight to the Declaration. See the arguments presented on page 9, paragraphs 2-5 of the amendment. It is asserted that when the Declaration is accorded proper evidentiary weight, all pending claims are allowable.

In view of the foregoing, Applicants submit that all of the claims of the present application are allowable and that the application is otherwise in condition for allowance.

Reconsideration of the rejection and a favorable action on the merits are respectfully requested.

Respectfully submitted,
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February 7, 2006

² All references to the amendment hereafter shall refer to the amendment filed May 24, 2005.